IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING

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MAY IT PLEASE THE COURT:

In its opinion the Court has declined to determine the constitutionality of the Renegotiation Act. By that action the Court has approved the enacting of legislation of questionable validity, so surrounded with procedural restrictions that the individual upon whom the law operates is unable to secure a determination of the validity of the law, until long after he has been irreparably injured thereby, and then only in a most indirect, slow, expensive, and laborious manner.

In this particular case the Court has approved the enactment of legislation of questionable validity, which permits the taking of property upon the arbitrary determination of an executive agency, provided such legislation then extends to the aggrieved individual the privilege of appearing before a second executive agency. This second agency when it does act, has no power to prevent the taking of property, or to order its restoration, if the first agency be found to be in error. Nevertheless its procedure must, under the decision, be satisfied. This second executive agency has already construed the trial *de novo* provisions of the Act to mean that appellant (petitioner there) must show that the determination of the first agency is in error. (*Nathan Cohen, petitioner* v. *Secretary of War,* The Tax Court, No. 27R, decided Oct. 22, 1946.) One additional administrative hurdle not heretofore appearing in the Act, has now been added under the rules of the second agency.

Various explanations appear as to the necessity of this indirect manner of securing a determination as to the validity of this new type of legislation, the sum total of which is the refusal of this Court to pass upon the validity of the Act, or to restrain the operation of the Act until the determination of The Tax Court has been received. The provisions of the Act will not change, nor will its operation, but appellant must run the gauntlet of all possible procedural hurdles, and sustain the loss of $270,000 before the merits of its case is to be determined.

Such a decision could result only from our inability to adequately present the issues. This is not a situation where public welfare demands immediate destruction of property with subsequent determination of the advisability thereof, and the damages therefor. Appellant's products were delivered in 1943, the determination of excessive profits by

the War Contracts Price Adjustment Board was made in 1945. It was not an exercise of the right of taxation. This determination was simply the assertion of a debt, created by a statute enacted *after* the alleged date of the debt. The determination of the War Contracts Price Adjustment Board was a determination made by it alone, against the persistent denials of the appellant that any amount was or is due, and against its repeated protests that such a determination must be made, if at all, by a court, before its property may be taken in satisfaction of the alleged debt.

Article III of the Constitution in part reads:

> "The judicial power shall be vested in one supreme court and in such inferior courts as Congress may from time to time ordain and establish—"
>
> The judicial power shall extend to all cases in law and equity arising under this constitution and the laws of the United States—to controversies to which the United States shall be a party."

This does not say that the judicial power to determine a debt due the United States shall be vested in one, two or more executive agencies, with power to 'short circuit' the courts, and to determine and collect that debt, without invoking judicial power prior to determination and collection.

The Fifth Amendment to the Constitution in part reads:

> "—nor shall any person—be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation."

This does not say that property may be taken without just compensation, provided ineffective administrative procedure be afforded, *after* the taking has occurred.

This does not say that the United States of America

may refuse to perform its contracts, and while so doing direct others to likewise refuse to perform their contracts.

In the opinion, all constitutional issues are waived aside, for a consideration of procedure. The agencies also waived aside all appellant's protests against the illegal taking of its property.

I.

The opinion recites that one of the grounds for dismissal in the District Court was that the suit was premature since proceedings were pending in the Tax Court. This reason has the approval of this Court. Foot note 6, then recites that The Tax Court proceedings remain pending and undetermined although the Court is informed that the causes have been argued and submitted for decision.

On January 13, 1947, we were informed by the appellees brief, that the Aircraft cases, after having remained dormant since the respective filing dates, had been set for hearing in The Tax Court on February 24, 1947. We are now advised that this Court is informed "that the causes have been argued and submitted for decision."

The information is incorrect. The source of the information is unknown to us. The cases have not been tried or argued in The Tax Court. If we are not confined to the record in this cause, it may be proper to advise this court that The Tax Court has continued the three cases until the Fall calendar 1947. The continuances since February 24, 1947 were believed advisable in the expectation that this Court would determine the validity of the acts, and if they were determined to be valid, would define in some degree the application of those acts particularly with respect to earnings under contracts made prior to either the first act or the Renegotiation Act.

It may well be that whether the cases have merely been commenced, tried or argued is immaterial in view of the court's opinion that exhaustion of administrative remedies, requires the final administrative decision before this Court will direct intervention for protection of appellant. If, however, the opinion of the Court depends in the slightest upon the status of The Tax Court cases, the Court should be advised that the cases have not been argued or submitted.

Aircraft, as the Court finds, has done all that it can do in connection with the administrative procedure in The Tax Court, and by prior experience finding it wholly inadequate to restrain the illegal taking of the property, sought the aid of the federal equity courts, under the doctrine announced by this Court in *Porter* v. *Investors Syndicate*, 286 U.S. 461, and approved in similar cases. Aircraft did not anticipate that under those decisions, such relief could be denied solely because the administrative procedure had not run its complete course, particularly since such procedure does not prevent the impending injury.

II.

In the opinion it is said that appellant seeks to short circuit The Tax Court proceedings.

In this statement the Court has overlooked the all important factor that the "short circuiting" of The Tax Court proceeding was not the idea of appellant or the purpose of this suit. Appellant believes this Act and the prior act to be unconstitutional and urges this Court to determine that question. But if the Court declines to take that action, it could and should, within the prayer for relief, enjoin collection until after The Tax Court had acted. (Rec. 166-167) The Court can scarcely place the

denial of this restricted relief on the ground that appellant seeks to short circuit The Tax Court proceedings.

Immediately after the War Contracts Price Adjustment Board had made its findings as to alleged excessive profits, appellant filed its petition for redetermination in The Tax Court, and while asserting the invalidity of the act, sought to avail itself of the expertness of that agency in fiscal matters, if the Act be valid. It is the executive agencies which have short circuited The Tax Court proceedings, and which refuse to await the determination of The Tax Court. They refuse to avail themselves of the services of that agency. Instead they impose their own arbitrary findings upon appellant and deprive it of its property upon their own findings, leaving to appellant the expert findings, and with those expert findings the uncertainty as to any manner of recovery of its property, should The Tax Court differ with the first agency.

If the findings of The Tax Court are of such peculiar advantage that appellant must await those findings before this Court will determine the constitutionality of the Act, then those findings should be a condition precedent to the taking of appellant's property. The proposed action is based solely upon the finding of the first agency, the War Contracts Price Adjustment Board. This agency was created February 25, 1944. Regardless of the high character of the individual members, the Board could not have the experience of The Tax Court in fiscal matters.

The Court should grant the alternative relief prayed in the complaint and restrain the taking of appellant's property until after the Tax Court has acted and until such time has elapsed thereafter within which appellant could apply for an appeal to the judicial branch of government for the purpose of passing on the validity of the Act and such other matters as might properly be brought before it for review.

III.

In denying to appellant relief in a court of equity, this Court has placed its reliance upon a number of grounds, (a) the fact that The Tax Court proceedings have not terminated, (b) the inadequacy of the showing made here of the necessity for equitable relief, and (c) the right of appellant to sue its customers, and in these suits secure a determination of the validity of the law.

As the Court recites, Aircraft has done all that it can do in The Tax Court. That is known to be insufficient to prevent the taking of its property, or to direct the restoration thereof. The opinion then recites (pp. 18, 19) that the findings in The Tax Court may be so favorable to appellant that constitutional questions need not be decided. In this statement the Court has overlooked the fact that appellant's property is taken upon the findings of the War Contracts Price Adjustment Board, regardless of the decision of The Tax Court, and that property cannot be restored by any decision of The Tax Court, regardless of how favorable it may be. In the *Waterman* case, upon which the Court relies, there had been no action to take Waterman's property, nor had any statement been made that such would be the action taken. Waterman sought to *avoid* Tax Court proceedings. Appellant accepted Tax Court proceedings, but requests that those proceedings be completed before the funds due from customers are paid into the Treasury. Appellant proposes at least that its property not be taken until The Tax Court has made its determination and the time has elapsed for an appeal therefrom to the courts upon such issues as the courts shall find proper.

The Court recognizes the distinction between this case

and the *Waterman* case and so continues: (pp. 19, 20 of the opinion)

> "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention. But, without going into a detailed analysis of the decisions, this rule is not one of mere convenience or ready application. Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress commands for judicial restraint in this respect are not lightly to be disregarded."

Nothing more could be shown than appears in this record. Nothing more would add to the showing made. The prescribed procedure is shown to be inadequate to prevent the taking of property, or to restore it. The impending harm is shown to be the fear of appellant and the positive assertion of appellees that they will (as they did do in the prior year) direct customers of appellant to pay funds due appellant into the Treasury of the United States.

Recognizing the unsatisfactory application of this reasoning, to the present situation, the Court says: (p. 20)

> "We need not decide in this case, however, whether mere doubt concerning the adequacy of administrative or other relief would be sufficient for allowing anticipation of the administrative determination. For that course is not to be followed if there is another remedy, not inconsitent with the congressional command, and of certain character, even though it be neither so ex-

peditious or convenient as some other sought to be substituted which circumvents that command. To this of course should be added the further qualification that following the prescribed remedy, upon the showing made will not certainly or probably result in the loss or destruction of substantive rights."

The Court then proceeds to place considerable reliance upon Congressional action, as a deciding factor against the exercise of the equity powers. All congressional action, even that "adopted during and to meet the emergency of war, and resting upon war powers," is not valid legislation. The several cases relative to the Lever Act in World War I established that fact. This court has repeatedly, demonstrated that the war powers do not constitute authority to disregard constitutional limitations. If invalid, the congressional action is a nullity and cannot be urged as a reason for doing indirectly that which could not be done directly. If the congressional action be valid, then no question arises as to "turning the scales."

This Court then reaches the conclusion that appellant's suit at law against its customers, or one customer, would be as effective as the procedure adopted here.

Suits at law against the customer will not prevent the taking of appellant's property. In Footnote 39, the Court considers the power of the District Court to enter a stay order, pending the determination of The Tax Court. Undoubtedly the District Court has the power to stay Aircraft's suit against a customer until after The Tax Court has acted. If it could not do that, then if The Tax Court should decide that only $70,000, not $270,000 was owed the District Court would find itself in the position of having entered a judgment which The Tax Court's determination would purport to nullify. It would appear that even the District Court must await the action of the Tax Court. This could occur regardless of any constitutional question. Fur-

ther in footnote 39, the Court discusses the power of the district court to grant stays of the order of the War Contracts Price Adjustment Board until The Tax Court had made its determination, and apparently concludes that the district court has such power. This power we sought to invoke. This is the power which the District Court declined to exercise in this particular case, and that action has the approval of this Court. This occurs in the face of the certainty that funds due appellant will be paid into the Treasury prior to the action of The Tax Court, and cannot be restored by any determination of The Tax Court.

When then, if ever, will the District Court enter an order staying the action of the War Contracts Price Administration Board until after The Tax Court has acted?

It is asserted that an additional reason exists for requiring the statutory proceedings to be followed, rather than allow the present suit. This is because the contractor becomes substantially a stakeholder between the Government and the subcontractor. The contractor is no stakeholder. The contractor does not merely withhold, he pays into the Treasury of the United States upon direction of the Secretary. The contractor or a subcontractor, making payments, is indemnified against any claims of a lower subcontractor by reason of payments so made, by such contractor or subcontractor (Sec. 403 (c) (2)), but neither in that section or in any other is the *subcontractor* indemnified as to the funds due to him by reason of payments made into the Treasury, or afforded a procedure for recovery.

The Court then concludes:

> "Accordingly, there would seem to be no substantial reason for regarding the suit against the contractor as inherently inadequate or ineffective for the protection of any rights of the appellant, including constitutional ones."

In this statement the Court ignores the fact that appellant *after* suing its customers, and having that suit stayed until The Tax Court has acted, and *after* awaiting the decision of The Tax Court, must then find a procedure to recover the money which has been paid into the Treasury of the United States.

Instead of standing identical with *Coffman* v. *Breeze*, as the Court suggests, where the aggrieved individual could immediately sue in the Court of Claims, this subcontractor must go through The Tax Court, secure its decision, and then select, at its peril, some procedure not appearing in the Act, which offers a probability of securing the funds of which it was deprived. In the meantime $270,000 of appellant's working capital has been denied to it.

CONCLUSION.

In conclusion, we respectfully urge this Court to grant a rehearing herein, in order that the constitutionality of the Act may speedily be determined.

If, however, this cannot be done until after The Tax Court has made its determination, then in fairness to appellant this Court should direct the issuance of an injunction until The Tax Court shall have acted, and time shall have elapsed for an appeal to the courts.

Respectfully submitted,

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